The Solicitors' Journal

VOL. LXXXV. **Saturday, September 6, 1941.** No. 36

Editorial, Publishing and Advertisement Offices: 29-31 Breams Buildings, London, E.C.4. Telephone: Holborn 1403.

SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address. *Annual Subscription:* £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 4d. *post free.*

CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.

ADVERTISEMENTS: Advertisements must be received not later than first post Tuesday, and be addressed to The Manager at the above address.

Current Topics.

THE WAR DAMAGE COMMISSION AND THE PUBLIC INTEREST.

AT a Press conference on 19th August, Mr. A. M. TRUSTRAM EVE, K.C., made a clear and detailed statement of the immediate and future policy of the War Damage Commission, of which he is chairman, in making value payments and cost of works payments. The occasion of the conference was the publication in the *London Gazette* of the same day of a notice applying s. 7 of the War Damage Act, 1941, to the following areas: City and County of London; City of Birmingham; City of Bristol; City of Coventry; City of Hull; City of Liverpool; City of Plymouth; City of Salford; City of Sheffield; County Borough of Bootle; County Borough of Birkenhead; County Borough of Southampton; County Borough of Swansea; County Borough of Wallasey; Borough of Gosport. The notice was issued under s. 7 (2) of the War Damage Act, 1941, which secures that the Commission shall have regard to the public interest in making payments in respect of war damage. The effect of the notice is that any person proposing to execute works of war damage repair in the area where the total ultimate cost will be more than £1,000, or ten times more than the net annual value of the hereditament, whichever is the less, must first inform the Commission. That body in its turn will consult the appropriate local and planning authorities to ascertain whether the carrying out of the proposed works would conform with the arrangements regarding replanning and other public interests. It is stated that the price limits laid down will be strictly enforced, and the incurring of a larger expenditure than that named without prior notification to the Commission will render the person doing such works liable to forfeit the right to repayment by the Commission. If, therefore, there is a doubt whether the figure named will be exceeded, the proposed work should be notified to the Commission. In such cases the Commission may impose requirements as to the nature of the works, the materials to be used, and the time for their execution, and it may change a cost of works payment into a value payment in those cases where restoration of a building would be contrary to the public interest. Where buildings have been totally destroyed, the Commission is already empowered by the Act, without previous notification in the *Gazette*, to attach conditions to the payments made, in order to further the public interest. It is emphasised that the present notice relates only to war damage, and must not be confused with any steps which may be taken with regard to reconstruction areas, as recommended in the Uthwatt Report, or with any measures decided upon by the authorities responsible for short- or long-term planning. In other words, as explained by Mr. Trustram Eve at the Press conference, the Commission is not a planning authority, but acts as a stopper against individual attempts at bad planning being set on foot before the authorities concerned with good planning have had a chance to perfect their schemes and carry them into operation. Mr. Eve gave the following useful examples. It may be, he said, that one or two partly damaged but quite repairable buildings survive in an otherwise destroyed street. It does not accord with the new plan for that street that they should be repaired, so, instead of paying for their repair, a value payment will be made, and possibly with that payment entirely new premises could be put up to accord with the new plan. Conversely, it may be desirable that a building which would normally attract a value payment should be erected pretty much as it was before, for instance, in the case of a police station or a town hall. In such a case the Commission may make a cost of works payment. Or it might be that a damaged but repairable five-storey building would only accord with the plan if restored as a four-storey building. In that case the Commission can pay for restoration of the four-storey building and make the owner an additional payment in lieu of the cost of restoring the fifth storey. When Wren planned the rebuilding of London in 1666 after the Great Fire, said Mr. Eve, the great problem was finance. The Commission's control of payments and the special powers given to it under s. 7 of the War Damage Act, 1941, will go a long way towards providing a solution of that aspect of the problem.

BOMB DAMAGE AND NEGLIGENCE.

WE are indebted to a correspondent for a brief newspaper report of a case decided recently by Hallett, J., at Liverpool Assizes. It was a case of exceptional importance to the owners of property damaged by enemy action, as the plaintiff was claiming damages for personal injuries which he had suffered as a result of being hit by a falling slate which had been loosened by bomb blast. The defendants were the owner-occupiers of a public house and the slate had been loosened as a result of a bomb which had burst nearby, and had destroyed the opposite premises on 21st September. The accident to the plaintiff had occurred a fortnight later. There was evidence that the damage to the public house was latent and could not be detected from the road. The learned judge found that the slate fell because it had been previously loosened by the blast, and that the defendants had no reasonable ground for supposing that the roof had been damaged. He accordingly gave judgment for the defendant. Our correspondent criticises the decision and argues that the fact that the defendants did not know that the slate was loose is a flimsy ground for the judgment. He adds that the fact that a slate falls is in itself proof of negligence, and even goes further and says that it is because defendants do not know that slates on their roofs are loose that they thereby are negligent. If lack of knowledge, he states, is to be a defence in an action for negligence, surely it must be a defence in an action for libel. Can a person, he asks, escape responsibility for a libel if he proves that he did not know that the statement published by him was libellous? Our correspondent does not give an accurate picture of the law in stating that the fact that a slate fell was in itself evidence of negligence, or that the defendants' lack of knowledge that the slates on their roof were loose was in itself evidence of negligence. The doctrine of *res ipsa loquitur*, to which no doubt our correspondent is referring, does not mean that there is any legal presumption of negligence so as to place on the defendant the burden of disproving it. It only means that the plaintiff, by proving the accident, has provided reasonable evidence on which the court may find for him, in the absence of explanation by the defendant, if in fact the thing causing the accident was under the management of the defendant or his servants. (See *Scott* v. *London and St. Katherine's Docks Co.* (1865), 3 H. & C., at p. 601, and Salmond on "Torts," 9th ed., pp. 470, 471.) It appears reasonably clear from the newspaper report that the defendants in the Liverpool case provided an explanation negativing the allegation of their negligence. No doubt the position might be very different if it were at all obvious that tiles had been loosened by the blast of a bomb, but every case must be judged on its own facts, and it would be placing an intolerable burden on property owners if it were to be held that they were absolutely liable to persons on the highway in all cases where such persons are injured by falling objects loosened by enemy action.

WAR DAMAGE LAW: AN EVALUATION.

THE expiry on 31st August, 1941, of the "risk period" under the War Damage Act, 1941, seems an appropriate occasion for the evaluation of some of the boons as well as some of the injustices left unremedied by that Act. An admirable appreciation both of the good and the bad in the Act is contained in an article by Mr. Morris Finer in the July issue of *The Modern Law Review* Beginning with the observation that by an ironic turn of history the city, which arose a safe confine within which civilisation could develop, had become most vulnerable to the disintegration of modern war, he points out that law, which is founded on precedent and is limited to existing historically defined concepts, must always miss the point of revolutionary situations. In the case of war damage, he says, the existing legislative scheme has done little more than hide the scars with a bandage. In the War Damage Act, a measure conceived out of necessity and born in haste is, with few exceptions, well drafted and free from inconsistencies. He contrasts the fact that advertisers and bill-posting associations got their way in exemption from contribution under s. 19, while local authorities had many reasonable demands refused. One of the most pungent of his criticisms is that in which he deals with the difference between the cost of works and the value payment. The defence put up, he states, is that while it is in the national interest for a partially destroyed house to be repaired, to reinstate a house which is a total loss would be to give a new article for an old one, ignoring the factor of depreciation before damage. In the latter case the national interest demands that the sufferer be content with the promise of payment, in an unspecified future, of a sum of money, calculated on a basis of value that will probably never exist again and will almost certainly be inadequate to replace his house at inflated post-war prices. The power of the Treasury under s. 14 to increase value payments in view of changed circumstances after the war is, in the writer's view, one of those vague discretions from which only the most sanguine can draw comfort. Another provision in which the writer sees lurking danger is the innocuous sounding discretion in s. 2, by which the Commission is to deal with land, for the purposes of payment, in such units as it determines, called "hereditaments." Inserted on the grounds of administrative expediency, the provision, it is stated, passes well beyond the scope of mere administration. If several properties in the same ownership have each suffered minor damage, to treat them as one unit will mean that a cost of works payment will be recoverable in respect of the whole damage, which will amount, as for the unit, to more than £5, while the individual small owner must wait for another bomb to fall on the street. It is, however, the position of the mortgagor which, according to the writer, forms the main justification for criticism. There are now about one-and-three-quarter million mortgages with building societies and two-and-a-quarter millions with insurance companies, banks and private individuals. The Act begins with the traditional legal theory underlying a mortgage transaction, namely, that the mortgagor is the owner of the equity liable on a personal covenant for which the house is security. The real content of the transaction, however, is that the wage-earner investing his savings is normally no more concerned with his debt than the mortgagee is with the mortgage. Passing by the anomalous differentiation whereby one class of mortgagees is entirely exempt from contribution, we find, says the writer, that a man who has paid off as much as a third of his debt and whose house is destroyed may find himself entitled, at the end of the war, to a negative sum and still liable to pay interest on the outstanding principal. Such results are so unjust, in the writer's opinion, that they will hardly be able to work in practice. As the writer says, the Act recognises its own experimental nature by limiting its life to expire in September, 1941, after which date a new Act will be necessary. It is to be hoped that those who have the responsibility of drafting the new legislation will carefully study the writer's articles.

APPORTIONMENT OF WAR DAMAGE CONTRIBUTION.

STRONG criticism has been made in *The Accountant*, for 23rd August, of the conclusions of the Council of The Law Society with regard to the apportionment of war damage contribution under the War Damage Act, 1941, to which we referred in a previous "Current Topic" (*ante*, p. 291). The particular statement which appears to have roused special opposition is that as the contribution is not analogous to premiums under an insurance policy and must be treated as a kind of "capital levy" in respect of war damage to land during the "risk period," there is no logical ground for apportioning the total contributions as between vendor and purchaser in accordance with the proportions of the risk period during which the vendor and the purchaser respectively have owned the property sold. It will be remembered that the Council referred to s. 82 under which contributions and indemnities under Pt. I are to be treated as outgoings of a capital nature. The Council concluded that as between vendor and purchaser the contributions must be considered as outgoings, which, so far as they become liabilities before the date for completion, fall on the vendor, and, so far as they become liabilities after the date for completion, fall on the purchaser. In an open contract not by correspondence the Council considered that the vendor would be liable for the instalments of contribution or sums payable by way of indemnity in respect of any instalment which becomes due in respect of the property up to the time for completion and that the purchaser would become liable for all subsequent instalments or indemnities. In the case of an open contract by correspondence the Council thought that each instalment of contribution or indemnity payment was made in respect of the calendar year in which it became payable and would, as between vendor and purchaser, be apportionable on that footing. This would also apply where The Law Society's Conditions of Sale, 1934, or the National Conditions of Sale, 13th ed., are incorporated.

THE CRITICISM.

THE writer of the article in *The Accountant* objects that the question under consideration is not the accounting principles on which the payments shall be dealt with in the accounts of property owners; it relates, he says, solely to the position which arises as between a vendor and a purchaser. He agrees with "what is probably the reaction of the great majority of our readers to the ruling given," and adds: "We cannot presume to cross swords with the Council of The Law Society on such a matter as the interpretation of the statute, but we are encouraged to make a comment because, in fact, the opinion does not purport to be based on purely legal considerations and, in fact, its governing words are that 'there is no logical ground for apportioning the total contribution.'" The writer urges that there is every logical ground for so doing. Section 20 of the Act, he says, makes it clear that in respect of the first risk period there is only one "contribution," and that this single liability is to be settled by "five annual instalments." If a vendor has settled a part of a single liability which is definitely expressed in the Act to cover a definitely expressed period of time, he seems entitled, the writer argues, to credit for having secured to the purchaser the benefit of protection during a period subsequent to the date of completion. The principle, according to the writer, is that a purchaser whose property may be destroyed within the risk period may receive the whole of the benefit of the compensation afforded by the scheme notwithstanding that, as the chances fall, he may find himself liable to pay either more or less than his time proportion of its cost as measured on a day-to-day basis. The matter, he continues, assumes greater importance when it is remembered that the present legislation, involving payments to be made several years ahead, deals only with the first risk period. Forthcoming legislation must obviously deal with subsequent periods, and no man now knows whether the scale of payments will be greater or less or whether a similar scheme of payments by extended instalments will be adopted. He suggests that the matter is of sufficient importance to warrant the seeking, by some appropriate process, of a ruling in the High Court. Such a ruling would certainly be valuable, but would be no more binding on parties who wished to contract to the contrary than the opinion of the Council of The Law Society, which, by the way, cannot be called a "ruling." It may be recalled that the Council's earliest suggestion on the subject was made to the Government before the Act was passed, and was to the effect that the most equitable method of apportionment would be by reference to the proportionate parts of the risk period during which the vendor and the purchaser would be respectively covered. No clause, however, was inserted to this effect in the Bill. Later, in the May issue of *The Law Society's Gazette*, the Council suggested that express provision to deal specifically with the matter should be inserted in every contract. Since then it has become increasingly clear that as the incidence of bomb damage has no logical basis, neither has the incidence of contribution, and a purchaser who becomes liable for four-fifths of the instalments of contribution after the expiry of the risk period has as little ground of complaint as the contributor in the safest of evacuation areas. The writer in *The Accountant* has wholly misconceived the position in supposing that either the receipt of compensation or the enactment of further risk periods are relevant factors to be considered in apportionment. What is relevant is that the Treasury may increase the number and amount of instalments for the risk period ending 31st August, 1941, under s. 22, and so increase the burden on the purchaser. While on a superficial view there is something to be said for the "reaction" of readers of *The Accountant*, the wiser solution is that reached, after careful consideration, by the Council of The Law Society.

LOST LAND OR CHARGE CERTIFICATES.

We are asked by the Land Registry to make it clear that the fee of £1 referred to in the "Current Topic" on "Lost Land or Charge Certificates" at p. 326 of our issue for the 9th August, is the total cost for the replacement of a land or charge certificate destroyed by enemy action, and that the fee of £2 2s. and the further sums to cover the cost of advertisement referred to in the "Current Topic" relate only to certificates lost by some other means.

Criminal Law and Practice.

ONUS OF PROOF IN MURDER CASES.

THE question of the onus of proof in murder prosecutions recently came before the Court of Criminal Appeal in *R.* v. *Prince* (*The Times*, 28th July). The appellant had pleaded provocation and the court substituted a conviction of manslaughter for the conviction of murder recorded at the Assizes, and awarded a sentence of fifteen years' penal servitude instead of the sentence of death.

The ground on which the court allowed the appeal was that the judge at the trial did not give a direction to the jury in the manner required according to the judgment of Lord Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462, at p. 482.

Lord Sankey said in that case that throughout the web of the English criminal law one golden thread was always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. Where there was at the end of the case a reasonable doubt, created either by the evidence of the prosecution or by that of the defence, as to whether the prisoner killed the deceased with a malicious intention, the prisoner was entitled to an acquittal.

"When dealing with a murder case," continued his lordship, "the Crown must prove (*a*) death as the result of a voluntary act of the accused, and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) unintentional, and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation, or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

That case was also an appeal against a conviction for murder. The appellant was a farm labourer, 21 years of age and of good character, who was alleged to have murdered his wife, aged 17, to whom he had been married for a little over three months. There was evidence that the killing was unintentional.

In summing up, Swift, J., quoted from Foster's "Crown Law" (1762), p. 255, to the effect that once killing was proved, "all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded on malice unless the contrary appeareth." The prisoner was found guilty and was later refused leave to appeal against his conviction.

In the House of Lords authorities were cited going back to the reign of King Canute (994-1035). Lord Sankey, however, went back no further than Sir Michael Foster on whose text-book statement Swift, J., based his summing-up. The statement, his lordship noted, had been repeated in text-books down to that date, including Stephen's "Digest of the Criminal Law" and Archbold's "Criminal Pleading, Evidence and Practice."

Lord Sankey said that if Sir Michael Foster meant that there might arise in the course of a criminal trial a situation at which it was incumbent on the accused to prove his innocence, there was no previous authority for that proposition. M'Naughton's case (1843), 4 St. Tr. (N.S.) 8, was an exceptional case in which the onus of establishing insanity rested on the defence, and it had nothing to do with the case before the court. The law of evidence at the time when Sir Michael Foster wrote his treatise was in a very fluid condition and it was only later that the court began to discuss such things as presumption and onus. The real meaning, his lordship said, of the passage in Foster and of a similar passage by Tindal, C.J., in *R.* v *Greenacre* (8 C. & P.. 35, 42), was that if it was proved that the conscious act of the prisoner killed a man and nothing else appeared in the case, there was evidence on which the jury might (not must) find him guilty of murder. Any other decision would mean giving power to the judge to decide the case, and not the jury, as he could rule that the prosecution had established its case and that the onus of proof was shifted to the prisoner.

The headnote to the case states that the proposition put forward by Sir Michael Foster and Tindal, C.J., was disapproved by the House of Lords, but it will be observed that this not strictly accurate, as the House merely put the proposition into modern form. It was a statement of the law which might mislead modern lawyers, who are trained to speak of presumptions, and onus of proof, but would not have so misled Sir Michael Foster's contemporaries.

The result of *R.* v. *Woolmington* is satisfactory from the point of view that it establishes the rule as to the presumption of innocence in the most serious of all criminal charges. Its actual effect in practice, however, is that the prosecution is still entitled to rely on proof of the killing by the prisoner as evidence of malice, and while the prisoner is not obliged to go into the witness box to show accident or provocation, his absence from the box will be conspicuous, and the risk of the inference of malice being drawn will, in many cases, be so heavy as almost to amount to a certainty. There still, however, remain those cases in which the facts as proved by the prosecution do not raise a presumption of malice, and in which there is no onus on the defendant in law and little risk in practice if he fails to proffer his own explanation of the events which have happened.

A Conveyancer's Diary.

PERSONAL REPRESENTATIVES' LIABILITY FOR LEASEHOLDS.

IN the Journal of 16th August there is a brief report of a recent case called *Re Owers* (not to be confused with the other recent *Re Owers*, which dealt with death duties). The one reported on 16th August was tried by Simonds, J., and concerns the liability of executors in respect of their testator's leaseholds. The testator had had a number of leaseholds at his death: after his death "his executors had entered into possession and by virtue of privity of estate had rendered themselves personally liable on the covenants in the leases." The summons raised the question whether they were nowadays entitled (as they certainly would have been under the traditional practice) to retain part of the estate as a fund to indemnify themselves against liability on those covenants, it having been suggested that Trustee Act, 1925, s. 26, was itself a sufficient protection to them. To anticipate the end of the story, Simonds, J., held that the executors were entitled to retain an indemnity fund.

Section 26 is comparatively little known, and I must confess to considerable doubts as to its effect. It is not exactly a new provision, having had ancestors right back to the Law and Property Amendment Act, 1859, though its present form is somewhat different from the previous one. It operates "where a personal representative or trustee" is "liable as such for" covenants or rent on a lease, or for a rent-charge or covenants ancillary thereto, or any indemnity in respect of any of the foregoing. If such a person satisfies all the liabilities on the lease or grant that have accrued and been claimed, and sets aside a sufficient sum to answer any liquidated sum that the lessee or grantee has to lay out, he may convey the property in question to a purchaser, devisee or beneficiary and thereafter may distribute the estate without being liable on any later claim under the lease or grant.

Now, as Simonds, J., pointed out, this provision is confined to the case of a fiduciary owner liable *as such* on the covenants. In the case before him the executors were not only liable as such, but had also entered, and so had, through privity of estate, become personally liable. The learned judge held that the section was of no avail where there was this double liability, and that the executors were therefore entitled to set aside part of the estate to indemnify themselves against the personal liability.

This decision would appear to be incontrovertible, and it is in line with earlier cases. Thus, in *Re Bowes*, 37 Ch. D. 128, the testator, who died in October, 1885, had had a yearly tenancy of certain land since April, 1872. He had used the land as a training ground for horses, receiving payment from others for its use. After his death his executors "took possession of the land" and carried on for a time, doing as the testator had done. Eventually the tenancy was determined as from April, 1887. North, J., in his judgment, discussed certain rather intricate points of pleading, as to which it is only necessary to say that they would still arise, so far as I can see, and that the judgment should be studied by anyone who has an actual case to fight. Substantially, however, he held (1) that the lessor has only a claim, *pari passu* with other creditors, against the testator's estate, but (2) that he can recover against a personal representative *de bonis propriis* up to the actual value of the leasehold from the date of the executor's entry. The conception of "actual value" is a very difficult one and was discussed at some length by Channell, J., in *Whitehead* v. *Palmer* [1908] 1 K.B. 151. Very broadly, it is true to say that the actual value is what the personal representative makes out of it, or would, with reasonable diligence, have made. *Whitehead* v. *Palmer* is of importance, however, as showing that a personal representative who takes possession of leaseholds acquires thereby privity of estate with the lessor and is thus liable personally in respect of claims accruing while such privity continues. The title and liability of an executor date back to the death of the testator under whom he claims; those of an administrator accrue at the date of the grant. Privity continues, of course, until the leasehold is effectively assigned over to someone else.

Now, this rule is a very serious one for personal representatives in spite of the limitation to "actual value"; in the first place, the "actual value" may very well exceed the sums received: moreover, such sums are in any event received as part of the estate and circumstances may well prevent them from all being still in the hands of the personal representative by the time that the lessor's claim falls due. Of course, if the estate is sufficient there is no great difficulty for the personal representative, as he can set aside an indemnity fund, though this step is not likely to commend itself to the beneficiaries, and is liable to create friction. And where an ample indemnity fund is not forthcoming, the only way, it seems, in which a personal representative can be absolutely safe is by not acquiring privity of estate with the lessor. In both *Re Bowes* and *Whitehead* v. *Palmer* it was indicated that privity

of estate had arisen because the personal representative was in possession. In the latter case, it is stated (at p. 153) that he was in "actual possession," which I take to mean that he physically occupied the premises. But in *Re Bowes* the personal representative did not do anything but carry on the testator's existing arrangements, so that it is clear that "possession" for this purpose means not only physical possession, but notional possession by receipt of rents and profits. That being so, it is extremely difficult to see how personal representatives can in any normal case avoid privity of estate. Thus, if the testator has the lease of a house, the personal representative will become liable under these rules if he does anything except abandon the place, a decision very difficult to take unless he knows almost directly after the death that the estate is insolvent. I have discovered a case, *Re Nixon* [1904] 1 Ch. 638, where the personal representatives avoided privity, but they did so because the testator had in his lifetime assigned the leaseholds, and his only outstanding liability at his death was in respect of breaches of covenant in his lifetime before his assignment. It appears to me that in practice the indemnity afforded by s. 26 is of no use except in cases like *Re Nixon*, though I speak subject to correction. That does not seem a very satisfactory condition of affairs, and I cannot help feeling that the framers of the section did not mean its scope to be so narrow. But I do not see how this conclusion is to be escaped if *Re Owers* was rightly decided, as I think it must have been, since it is in line with *Re Bowes* and *Whitehead* v. *Palmer*. The subject would appear to be one that should be attended to by the Legislature when there is time for such things; in the meantime, all one can do is to point to the existing rules and advise a high standard of caution for personal representatives.

It may be as well in conclusion to say a word about the indemnity funds that have to be set aside in those cases if the estate is sufficient. It is necessary that such a fund should be fairly large, as it has to cover not only rent, but liability on repairing, and other, covenants. The existence of such a fund cannot fail to be unpopular with all concerned, as it hangs up the distribution of the estate. The accruer of new liabilities comes to an end, of course, when the privity of estate ceases, e.g., when the executor assigns the leasehold to a purchaser. The fund need not then be retained longer than the period until any claim against the executor becomes statute-barred. Thus in *Re Lewis* [1939] Ch. 232, the testatrix died in 1890 possessed of a number of leaseholds, and a fund of £5,000 was set aside. This large sum remained in court for almost fifty years. The leases had, however, been assigned to beneficiaries in or about 1891. Having regard to *Re Blow* [1914] 1 Ch. 233, Simonds, J., held that the fund might be distributed. It would seem that the maximum period (apart from extensions for disability, etc.) would now be that of twelve years prescribed for actions of covenant by the Limitation Act, 1939, and if the action is one for an account it would be only six years. In practice, of course, the personal representative can hardly rely on the chance that the action will only be one for account, and will almost necessarily insist on retention for the full twelve years. That, however, is a lot less than the period during which the fund had been retained in *Re Lewis* and a good deal less than the twenty-year period for actions of covenant which existed before 1st July, 1940.

Our County Court Letter.

PARENT'S LIABILITY FOR CHILD'S TORT.

In *Perrygrove and Another* v. *Wall*, recently heard at Bromsgrove County Court, a girl, aged thirteen years, claimed £10 as general damages for pain and suffering. Her father, as co-plaintiff, claimed £2 as special damage for medical expenses. The parties were neighbours, and on the 21st September, 1940, the defendant and a friend were shooting with an air-gun at a target in the defendant's garden. The plaintiffs' case was that the girl plaintiff, having entered the garden of the defendant on the invitation of his wife, was shot in the cheek by a pellet fired by the defendant's son, aged four years. The gun had negligently been left within reach of his son by the defendant while inspecting the target. The defence was a denial of the alleged negligence, and it was contended that the girl plaintiff was a trespasser in the defendant's garden. It was not true that she came to return some borrowed comic papers, as the latter were not lent to her until after the accident. His Honour Judge Roope Reeve, K.C., observed that a parent was not generally responsible for the acts of his infant child, but there had been negligence in leaving the air-gun near a small child. The latter could not be expected to do otherwise than he had done, and it would not have affected the defendant's liability if the injured girl had been a trespasser. It was not permissible to use a gun against a trespasser. Judgment was given for the plaintiffs for £10 and £2 respectively, with costs. It is to be noted that in *Beebee* v. *Sales* (1916), 32 T.L.R. 413, the question was left undecided whether it is negligent to leave a child in possession of a potentially dangerous toy, without knowledge of a mischievous propensity. In *Hawley* v. *Alexander* (1930), 74 Sol. J. 247, a boy's mother was held liable for negligence in allowing him to use an air-gun, with which he injured a playmate. There is no joint liability upon a father, by reason of his wife's tort, since the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 3.

EXCESSIVE CHARGE FOR SUB-LETTING.

In a recent case at Trowbridge County Court (*Trimmer* v. *Hemsley*) an application was made for possession of a house under the Rent, etc., Restrictions (Amendment) Act, 1933, s. 4 (1) on the ground that the rent charged by the tenant for a sub-let part was in excess of the recoverable rent of that part of the house. The plaintiff's case was that she had let the house to the defendant at a rent of 16s. a week, inclusive of rates. The defendant had subsequently sub-let two rooms, without the plaintiff's permission, at a rent of 12s. 6d. a week, inclusive of gas and electric light. The sub-letting had occurred in October, 1940, and notice to quit was given expiring on the 3rd January, 1941. A sufficient rent for the sub-let portion would be 10s 6d. a week. The defendant's case was that the sub-tenants were satisfied with the rent charged, but the defendant had no objection to reducing it to 10s. 6d. a week. The plaintiff stipulated that this should be inclusive, i.e., that there should be no "extras" for gas or electricity. His Honour Judge Kirkhouse Jenkins, K.C., observed that the plaintiff had nothing to gain, and had acted from patriotic motives. If a separate electricity meter were installed, the agreed revised rent should be reduced to 9s. a week, as the sub-tenant would be paying direct for electricity. In view of the agreement between the parties, it was unnecessary to make an order for possession, and an adjournment was granted for the terms (including the installation of a separate meter) to be carried out.

BREACH OF WARRANTY OF MARE.

In a recent case at Lampeter County Court (*Lloyd* v. *Lewis*) the claim was for £24 14s. 6d. as damages for breach of warranty. The plaintiff's case was that he had bought a mare for £21 from the defendant, who had stated that she was quiet in all gears, and was not a kicker. Nevertheless, she was found to be such a kicker as to be useless, but the defendant refused to take her back or even to try her in harness. Ultimately the plaintiff sold the mare for £8, instead of £15 as asked by him, but the buyer had only bought her as a gamble and had been unable to harness her. Corroborative evidence, as to the mare being a kicker, was given by three witnesses. The defendant's case was that he had bought the mare for £22 10s. at a sale, and the poster had advertised her as "warranted good worker." The latter was the only representation made on the sale to the plaintiff, to whom nothing was said about her being quiet. The defendant had seen the mare working in all gears, and had never seen her kick. Corroborative evidence, as to the mare not being a kicker was given by the original owner and by two other witnesses. The evidence of the auctioneer was that, on the sale by the original owner, the mare was warranted as a good worker. The price of £8 was absurd, even for a kicker. His Honour Judge Frank Davies gave judgment for the plaintiff for £7 7s. 6d. with costs.

War Legislation.

STATUTORY RULES AND ORDERS, 1941.

E.P. 1229. **Channel Islands** Companies (Registration) Rules, August 19.
E.P. 1227. **Consumer Rationing** Order, 1941. Licence, August 19, in respect of Certain Woollen Cloth.
E.P. 1213. **Defence** (Finance) Regulations (Isle of Man), 1939. Order in Council, August 15, amending Regulation 3c.
E.P. 1220. **Eggs** (Control and Prices) (No. 2) Order, 1941. Amendment Order, August 15.
E.P. 1221. Eggs (Control and Prices) (Northern Ireland) (No. 3) Order, August 15.
E.P. 1234. **Food** (Restriction on Dealings) Order, August 20.
E.P. 1226. **Limitation of Supplies** (Woven Textiles) (No. 7) Order, 1941. Licence, August 15.
E.P. 1202. **Loading of Ships** Order, August 14.
No. 1219. **Motor Vehicles** (International Circulation) Regulations, August 6.
E.P. 1217. **Straw** (Control and Maximum Prices) Order, 1941. General Licence, August 9.
E.P. 1218. Straw (Control and Maximum Prices) Order, 1941. General Licence (Small Traders), August 14.
E.P. 1216. Straw (Control and Maximum Prices) Order, August 9.
No. 1223. **Surrey** (County Roads Cesser) Order, July 31.
No. 1156. **Trading with the Enemy** (Specified Areas) (No. 6) Revocation Order, August 19.

Mr. Arthur Melmoth Walters, solicitor, of Lincoln's Inn and of Holmwood, Surrey, left £20,368, with net personalty £13,442.

To-day and Yesterday.

LEGAL CALENDAR.

1 September.—On the 1st September, 1803, a man named Roche was tried in Dublin for his part in Robert Emmett's abortive rising. It was proved that he was arrested holding a pike and that when seized on he "made an hideous noise, grappled his pike and offered a considerable resistance." He pleaded that the weapon had been forced on him by the insurgents, and though several witnesses were called as to his character, none could say anything in favour of his loyalty. After a few minutes' consideration the jury found him guilty.

2 September.—John Howard, who was born on the 2nd September, 1726, deserves a place in the legal pageant. When he became high sheriff of Bedford in 1773 he found the prison conditions horrible—the prisoners crowded in damp, dark cells, the gaolers unsalaried and wholly dependent on the fees extracted from their charges. Thus prisoners acquitted or unprosecuted were often detained for months until they paid the extortionate expenses of their confinement. His experiences took him from county to county inquiring into similar abuses, and thenceforth he devoted himself to prison reform. In the following year he gave evidence before a committee of the House of Commons and the immediate result was legislation which was the starting point of the proper regulation of prisons.

3 September.—James Pagitt died at Tottenham on the 3rd September, 1638, and a monument was erected to his memory in the parish church there. He came of a Northamptonshire family, and his father, an eminent lawyer, was twice Reader at the Middle Temple and Treasurer in 1599. He himself was called to the Bar there in 1602. His career was in the Exchequer and, having acted as Comptroller of the Pipe, he was in 1631 appointed Cursitor Baron of the Exchequer. He married three times.

4 September.—On the 4th September, 1666, the Great Fire sweeping across London got as far as the Inner Temple, part of which it burnt before it could be checked. As it was Vacation few of the Templars were in town. Many papers and valuables were destroyed because those who remained would not suffer an absent man's chambers to be broken into for fear of committing a trespass. A letter of this date from a gentleman who had succeeded in carrying part of his stuff to Covent Garden reads: "Being now escaped from the Temple with very little more than the skin of my teeth, a greater part of my books being carried away by one called in to carry them to the Swedish residence where now I am till I can get a cart to proceed (for at the Temple neither boat, barge, cart or coach is to be had; all the streets full of goods and the fire flaming into the very Temple) . . . ."

5 September.—On the 5th September, 1789, Thomas Phipps, a prosperous attorney, was hanged at the Old Heath, near Shrewsbury, with his twenty-year-old son. They had been convicted of forging and uttering a promissory note, but both protested their innocence, till shortly before the execution the young man confessed that he alone was guilty and that his father knew nothing of the forgery. They went to the gallows in a mourning coach attended by a clergyman. On the way the father said: "Tommy, Tommy, thou hast brought me to this shameful end but I freely forgive thee."

6 September.—On the 6th September, 1751, Henry Bryant, an Irishman, was hanged on Kennington Common for robbing a gentleman in Chelsea Fields. He had seen active service in the Navy and had been lucky enough to receive £560 prize-money so that he was able to take a public-house in Shoreditch. Unfortunately for him he fell in with criminal circles and was a ringleader in a great many robberies. Before he came to the gallows his activities had brought him into various London prisons no less than twenty-seven times.

7 September.—Frederic Edward Weatherly, K.C., died on the 6th September, 1929, at the age of eighty-one. He was successful at the Bar but famous as a song-writer.

The Week's Personality.

Most of the people who have sung "Nancy Lee," "The Old Brigade," "The Midshipmite," "For We'm Come Up from Somerset," would be astonished to know that they were written by a successful K.C., who in a long lifetime and a busy career found himself able to produce over three thousand songs. But then Frederic Weatherly was no ordinary barrister. Born and bred in Somerset, his earliest ambition, springing from the songs of Burns which his mother sang him, was that some day he too might write songs. In 1867 he went to Brasenose College with a scholarship and there by what he felt was a rare piece of good fortune Walter Pater was his tutor. It was Pater who reminded him later on when he was writing that it was just as necessary to be scholarly and sincere in the simplest song as in the greatest epic. After taking his degree Weatherly stayed at Oxford for about twenty years taking pupils, one of whom was St. Loe Strachey, afterwards the distinguished editor of the "Spectator." It was only in 1887 when he was thirty-nine years old that he was called to the Bar at the Inner Temple. He read in the chambers of Sir Henry Dickens, joined the Western Circuit, where he knew and admired the famous John Alderson Foote, and finally in 1893 decided to localise at Bristol, where he obtained a large practice. He crowned his career by taking silk in 1925.

Notes of Cases.

COURT OF APPEAL.

In re **Samuel's Will Trust; Jacobs** *v.* **Ramsden.**

Greene, M.R., Clauson and du Parcq, L.JJ. 31st July.

Will—Construction—Condition forfeiting interest if beneficiary marries a person "who is not of Jewish parentage and of the Jewish faith"—Condition subsequent—Void for uncertainty.

Appeal from a decision of Bennett, J. (85 Sol. J. 225).

The testator, who died in 1925, by cl. 5 of his will bequeathed a legacy of £17,000 to be held by his trustees upon the trusts thereinafter declared concerning the share of his residuary estate settled on his daughter Edna and her issue. By cl. 7, after giving a prior life interest to his wife, he bequeathed his residuary estate to his children and he settled the shares of his daughters on them for life with remainder to their children with a power to appoint a life interest to a husband. By cl. 8 he provided "I declare that if . . . my said daughter Edna Samuel shall at any time after my death contract a marriage with any one who is not of Jewish parentage and of the Jewish faith then as and from the date of such marriage all the trusts powers and provisions in this my will contained and capable of taking effect in favour of (*a*) my said son or daughter contracting such marriage, or (*b*) the person with whom he or she shall contract such marriage or (*c*) any child or children to be born of him or her issue of such marriage shall cease and determine and this my will shall thenceforth operate and take effect as if my said son or daughter as the case may be had died at the date of such marriage." The testator's daughter Edna married, in 1927, one C, whose parents were Wesleyan Methodists. It was not suggested that C was of Jewish parentage or had at any time been of the Jewish faith. This summons was taken out by beneficiaries under the testator's will asking whether the trusts in favour of Edna determined when she married. Bennett, J., held the condition in cl. 8 void for uncertainty. He said that the testator had not indicated the sense in which he had used the words "of Jewish parentage." It was not clear whether they referred to the race of the husband's parents or to their religion. Nor was it possible for the court to say whether a man was of the "Jewish faith."

Greene, M.R., delivering the judgment of the court, said that the reasoning of Bennett, J., could not stand if it were possible to resolve the ambiguity which he had found in the testator's language. In the opinion of the court the context of cl. 8 pointed to the fact that the testator was thinking not of race but of religion. It was clear that the testator would not have wished his daughters to marry a proselyte who, for the purpose of satisfying the condition in the will, had gone through the ceremony of being admitted to the Jewish faith. To avoid that he had imposed the condition that the husband should have been born into it by reason of his parents having been of that faith. The expression "Jewish parentage" in a context of this kind included both parents and referred to the time when they became parents. So construing the clause, the testator was laying down a good test to enable him to achieve the result which he intended. It had been argued that, assuming the words "of Jewish parentage" had that meaning, there was an insuperable difficulty in ascertaining the facts. That argument was not directed to uncertainty. The difficulty in ascertaining the facts was not sufficient to render the clause void. It was further contended that the expression "Jewish faith" was vague, as it left uncertain what tenets of the faith might be held, what observances were required and what fervour in holding them. The matter was not to be construed by references to sectarian disputes or by degrees of zeal in attendance at ceremonies. *Prima facie*, the matter had to be answered by the person concerned. It was to be assumed that normally, if a person were asked if he was a Jew by religion, he would give a truthful answer. The appeal must be allowed, and a declaration would be made that cl. 8 was not void for uncertainty and the trusts in favour of Edna ceased on her marriage.

Counsel: *R. F. Roxburgh*, K.C., and *Danckwerts; C. V. Rawlence; Humphrey King; Vaisey*, K.C., *and Winterbotham; Gray*, K.C., and *P. B. Morle.*

Solicitors: *Hunt & Hunt; Burton & Ramsden; Whitehouse, Gibson & Oldershaw; L. A. Hart.*

[Reported by Miss B. A. Bicknell, Barrister-at-law.]

Inland Revenue Commissioners *v.* **Payton.**

Greene, M.R., Clauson and Goddard, L.JJ. 29th November, 1940.

Revenue—Sur-tax—Sums amounting to quarter of "income" payable under deed—Sums apportioned on covenantor not "income."

Appeal from a decision of Lawrence, J.

The respondent, Payton, claimed that in his assessment to sur-tax for the year 1935-36 deduction should be allowed in respect of £11,371 which he alleged to be payable by him under a deed. By

that deed, dated the 22nd March, 1935, the respondent covenanted with a trustee that he would every year during his (the respondent's) life pay to the trustee an annual sum, less income tax, equal to one-quarter of his income. The deed defined the expression "income" as "the income of the settlor as computed for the purpose of the Income Tax Acts . . . after deducting therefrom all such annual sums, annuities or interest as are allowed as deductions in computing total income . . ." In 1937, directions were made under s. 21, Finance Act, 1922, as extended by s. 20, Finance Act, 1936, on a certain company for the year ending the 31st December, 1935, and for the period from the 1st January to the 3rd February, 1936, and as a result two sums totalling £45,484, of the total of which the £11,371 in question was a quarter, were apportioned to the respondent out of the company's actual income. An assessment to sur-tax was made on the respondent in the name of the company in the sum of £45,484 for 1935-36. The sur-tax payable on that assessment was subject to any adjustment which might follow on the respondent's personal assessment to sur-tax for the same year. The respondent claimed that, as a result of the assessment made on him in the company's name, he was liable under the deed of March, 1935, to pay the trustee £11,371; and he in fact paid the trustee that sum, less income tax, in April, 1937. He contended that the sum so apportioned to and assessed on him came within the definition of "income" in the deed. The Crown contended that the £11,371 was not included in the definition and was inadmissible, as a payment made under the deed, in computing his income for purposes of sur-tax for the material year. The Special Commissioners held that the deed's definition of "income" included sums apportioned to the respondent under the Act of 1922; that his liability under the deed was accordingly increased by £11,371; and that that sum was deductible in computing his income. The Crown appealed. Lawrence, J., held that sums apportioned under s. 21 of the Act of 1922 were not the respondent's income, sur-tax on them having been assessed in the name of the company, and allowed the appeal. The assessee now appealed to the Court of Appeal.

GREENE, M.R., said that the basic charge imposed by the Income Tax Acts was a charge on what he described as income of the individual taxpayer. The method of computing the taxpayer's income for the purpose of tax in regard to a given year was artificial, and led to a result which in many, perhaps most, cases did not represent the actual income received by the taxpayer in the year of assessment. To the basic conception of income tax certain qualifications had been made, the effect of which had been to treat for certain purposes as income of the taxpayer income which belonged in law to someone else; examples were the case of husband and wife, s. 20, Finance Act, 1920; s. 21, Finance Act, 1936; and s. 38, Finance Act, 1938, and sur-tax. Under s. 21 (1), Finance Act, 1922, as amended, a direction could be made that the income of the company in question should, for purposes of assessment to sur-tax, be deemed that of the members, and apportioned among them. Sur-tax was then to be assessed and charged in respect of each member, assessment being made on the member in the name of the company. If the member did not pay the tax it was payable by the company. The income dealt with by those provisions was, of course, that of the company. It would continue to belong to the company until a distribution was made among the members; but for the purposes of sur-tax it was deemed to be the income of the members and must accordingly be taken into account in computing their total incomes. The settlement defined "income" as meaning "the income of the settlor as computed for the purposes of the Income Tax Acts." True, computation of income for the purpose of sur-tax was a computation of "total income"; but it was nevertheless a computation of income, and if the matter had stood there it could not have been doubted that the deduction claimed was admissible. The Crown pointed to the fact that the part of the definition dealing with deductions referred to total income, whereas the earlier part of the definition referred to "income," and argued that the variation in language showed that the computation of income could not be a computation of total income. But if "income" did not mean "total income," to what income did it refer? It was impossible to accept the reply that it meant only income of the appellant which was taxed (i) by direct assessment and (ii) by deduction at source, since no computation of a taxpayer's income included income taxed at source, except for the purposes of sur-tax and claims to relief, and a computation made for either of those purposes was a computation of total income, which was *ex hypothesi* excluded. Thus, as pointed out by the appellant, if "income" did not mean "total income," it must be limited to income subject to direct assessment, that being the only income in respect of which a computation fell to be made. It was not possible to place so limited a construction on the word. The computation referred to was therefore the computation of total income for purposes of sur-tax, and the appeal must be allowed.

CLAUSON and GODDARD, L.JJ., agreed.

COUNSEL: *King*, K.C., and *F. Grant*; *The Solicitor-General* (Sir William Jowitt, K.C.), *Stamp* and *Hills*.

SOLICITORS: *Marshall & Hicks Beach*; *The Solicitor of Inland Revenue*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

In re **Woodhouse**; **Public Trustee** *v.* **Woodhouse**.
Simonds, J. 7th May, 1941.

Will—Trust for conversion—Power to postpone—Estate includes reversionary interests in realty—Death of tenant for life—Whether reversionary interests should be apportioned—Rule in In re Earl of Chesterfield's Trusts limited to personalty.

Adjourned Summons.

The testator by his marriage settlement made in 1909 settled certain perpetual rent charges and a freehold house on trust for his wife for life with an ultimate trust in the events which happened, for himself. By a second settlement of 1909 he settled certain perpetual rent charges on his sister for her life with remainder to himself. The testator died in 1912, having by his will devised and bequeathed all his real estate to his trustees upon trust to sell the same with the fullest power to postpone sale and he directed his trustees to pay one-half of the income of his estate to his wife for life and the income of the other half to his sister with ultimate trusts in favour of certain relatives. The wife died in 1939 and the sister in 1940. The testator's reversionary interests under the two settlements of 1909 were never sold. This summons raised the question whether there ought to be some apportionment of the proceeds of sale, or their value, as between the tenants for life under the will and the persons entitled in reversion under the rule in *In re Earl of Chesterfield's Trusts* (1883), 24 Ch. D.643.

SIMONDS, J., said that the question he had to consider was whether the equitable rule in *In re Earl of Chesterfield's Trusts* was applicable at all to real estate. That rule was established in order to deal fairly in the administration of estates between persons having successive interests in a residue. Under the rules laid down in *Howe* v. *Earl of Dartmouth*, 7 Ves.137 *a*, the tenant for life of residuary personal estate was not entitled to the whole of the income of such investments as were not authorised by the trusts of the will. Complementary to that rule was the rule in *In re Earl of Chesterfield's Trusts* whereby the tenant for life got some benefit from a reversionary interest forming part of the testator's estate, which, in the interests of the estate, was not immediately realised. The rule in *Howe* v. *Earl of Dartmouth*, was (*supra*) not applicable to real estate. In no case had the rule in *In re Earl of Chesterfield's Trusts* been applied to real estate. The authorities showed that, in the course of administration, a divergence existed between real and personal estate. It would be unfair as between tenant for life and remaindermen if the rule in *In re Earl of Chesterfield's Trusts* applied and the other rules did not. He had come to the conclusion that that rule had no application to the reversionary interests in realty which were comprised in the estate of the testator. Accordingly he declared that there was to be no apportionment.

COUNSEL: *H. A. Rose*; *R. F. Roxburgh, K.C.*, and *Sir Norman Touche* (for *Harold Brown* on war service); *H. B. Vaisey, K.C.*, and *J. M. Easton*.

SOLICITORS: *Woodcock, Ryland & Co.*, for *Brooks, Marshall, Moon & Co.*, Manchester; *Morecroft, Sproate & Killey*, Liverpool; *Cunliffe & Airy*, for *Tatham, Worthington & Co.*, Manchester.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

KING'S BENCH DIVISION.

Luis de Ridder, Limitada *v.* **André et Cie, S.A., Lausanne.**
Viscount Caldecote, C.J. 11th February, 1941.

Contract—Sale of Grain—Appropriation notice to be sent to buyers' agent at Antwerp—Whether condition precedent—Compliance impossible—Notice sent to buyer himself in Switzerland—Cancellation of contract.

Special Case Stated by an arbitrator.

In January, 1940, two companies entered into two contracts for the sale to the buyers in Switzerland of 1,000 tons of Argentine maize from Buenos Aires. Shipment was to be made c.i.f. Antwerp in May, 1940. The contracts were in the form of the London Corn Trade Association's contract, but the common appropriation clause was superseded by a special clause providing that all notices of appropriation must be sent to the buyers' agents at Antwerp, where the documents were to be presented for payment. The maize was shipped on the s.s. *Atlantico* under a bill of lading dated the 16th May, 1940, and the sellers instructed their London agents duty to give notice of appropriation. On the 19th May, however, the Germans occupied Antwerp. The *Atlantico* having been intercepted, her cargo was requisitioned by the British Government. The buyers' liability to pay remained, as the contracts were c.i.f. Being unable to communicate with Anfwerp, the sellers' agents on the 25th May sent the notice of appropriation to the buyers themselves at Lausanne. The buyers refused to accept the notice, maintaining that it should have been given at Antwerp. The dispute was referred to arbitration, which resulted in an award in favour of the sellers, subject to the opinion of the court on this special case.

VISCOUNT CALDECOTE, C.J., said that the ordinary appropriation clause of the contract provided that notice of appropriation, with the name of the ship, should be cabled by the shipper of the grain direct to his buyer or to his agent, and be passed on by his buyer and by each subsequent seller to his buyer. For reasons which

did not appear, that clause had been replaced by another requiring notice of appropriation, etc., to be given to the buyers' agent at Antwerp. The question was whether a notice of appropriation which, but for that clause, might have been given to the principals or their agents, was good when it had been given to them notwithstanding the superseding clause. That clause having been added to the contract, it was, his lordship thought, important to the parties that it should be observed strictly. It was argued for the buyers that, as it had not been observed, they, quite apart from the question whether the clause was a condition precedent, were not obliged to accept the notice. He agreed with that contention. There was no reason to suppose that while those parts of the clause requiring presentation of documents and payment had to be strictly complied with, that part of the clause relating to the giving of notice of appropriation might or might not be performed and would, if not performed, give rise only to a right of compensation in damages. It was further argued for the sellers that the superseding clause was not a condition precedent. He (his lordship) thought that it was, and two decisions cited by counsel for the sellers, *Graves* v. *Legg & Co.* (1854), 9 Ex. 709, and *Kidston & Co.* v. *Monceau Ironworks Co., Ltd.* (1902), 7 Com. Cas. 82, illustrated very well the considerations to which the court might direct its attention in deciding such a question. The stipulation here was quite definite. It was a clause which, in the circumstances in which the contract was made, the buyers might have had very good reason for inserting. The stipulation passed the test that it went to the root of the contract and was of its essence. There had been failure to comply with a stipulation in the contract which had to be complied with before the contract could be performed. It was now impossible for the sellers to perform their contract, and if it were necessary to decide the question, he would hold that the contracts had been cancelled before the 25th May, 1940, by virtue of the prohibition clause in the contract. The question of law must accordingly be decided in favour of the buyers.

COUNSEL : *Devlin; Cyril Miller.*

SOLICITORS : *Richards, Butler & Co.; Thomas Cooper & Co.*

[Reported by R. C. CALBURN, ESQ., Barrister-at-Law.]

Billam *v.* **Griffith.**

Lawrence, J. 21st March, 1941.

Revenue—Income Tax—Sale of film-rights in play—Whether proceeds capital or income.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant, having practised as a barrister for seventeen years, became paid secretary to the National League of Airmen. While holding that appointment he wrote a play called "Spring Tide" in conjunction with another person, which ran successfully, being produced under a written agreement between the appellant, his collaborator and a theatrical producer. In September, 1936, these persons granted to a film company all motion-picture rights throughout the world in the play for ever for £7,500. In August, 1936, two further agreements were entered into for the production of the play in Holland and Denmark. In respect of the sums received by him under those two agreements, together with his share of the £7,500, the appellant was assessed to income tax under Sched. D to the Income Tax Act, 1918. The appellant had produced no play for money except "Spring Tide," although he had attempted to write others. He regarded playwriting as a hobby, as he always had other occupation. He had tried to sell one play besides "Spring Tide," and had since written another play which he hoped to sell. He gave up his secretaryship in December, 1936, became a director of a theatre in which he had no financial interest, and lived on capital and what he derived from "Spring Tide." He had not settled down to write plays. The appellant contended on those facts that the payments in question were of a capital nature and not annual profits or gains chargeable under Sched. D, and that he had not carried on the vocation of a dramatist in the years in question. The Crown contended that he had carried on that vocation in those years, and that the payments were chargeable under Case II of Sched. D. The Special Commissioners found to the same effect and, subject to an adjustment of figures, confirmed the assessments. The taxpayer appealed.

LAWRENCE, J., said that in his opinion there was evidence entitling the Commissioners to conclude that the appellant was carrying on the vocation of dramatist or playwright. It was argued for him that, even so, the sale outright of motion picture rights in a play being a sale of copyright, which was property, the consideration paid for it was of a capital nature and not assessable to income tax. He relied on *Inland Revenue Commrs.* v. *Sangster* [1920] 1 K.B. 587, which raised the question whether an inventor was carrying on a trade or business within the meaning of the Excess Profits Duty Act. On the facts there, Rowlatt, J., concluded that the inventor was not carrying on a trade or business; but he recognised that an inventor, an author or a painter might be carrying on a business which involved or included the realisation of the product of his brain by outright sale. The Special Commissioners here had, it seemed, concluded that it was an ordinary incident of the business of a dramatist or playwright to dispose of his plays, or, at any rate, the motion-picture rights in them, by outright sale. There was no evidence to the contrary, and it was open to the Commissioners to reach that conclusion. When such a vocation was carried on it was an ordinary incident of the disposition of plays to realise them by means of royalties or sale outright; it was really the realisation of what might be regarded as the dramatist's circulating capital. His brain being his fixed capital, his circulating capital was the plays which might no doubt for certain purposes be regarded as property, but which at the same time might be realised in the course of the business which he carried on. The appeal failed.

COUNSEL : *G. G. Honeyman; The Solicitor-General* (Sir William Jowitt, K.C.) and *R. P. Hills.*

SOLICITORS : *H. S. Wright and Webb; The Solicitor of Inland Revenue.*

[Reported by R. C. CALBURN, ESQ., Barrister-at-Law.]

Duff (Inspector of Taxes) *v.* **Barlow.**

Lawrence, J. 1st April, 1941.

Revenue—Income tax—Agreement for management of company—Sum paid to manager for cancellation of agreement—Whether taxable.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent was the managing director of M. B. Co., Ltd., which in 1935 purchased a tinplate works for the manufacture of tinplate which it required for its work. It formed a subsidiary company, E. T. P. W., Ltd., to run the newly acquired works. As the running of the new company would involve extra work for the respondent and another director of M. B. Co., Ltd., the two men agreed to accept as remuneration for that work a percentage of the profits which E. T. P. W., Ltd., would have made had it sold its tinplate products to M. B. Co., Ltd., at market price. In fact, the tinplate was to be sold to M. B. Co., Ltd., at cost price. The respondent and his co-director managed E. T. P. W., Ltd., throughout 1935 and 1936, and would have been entitled to a considerable sum for the two years on the agreed basis, although nothing was in fact paid to them. In 1937 it was recorded in the minutes of a meeting of M. B. Co., Ltd., that the agreement with the respondent and the other director for the management of E. T. P. W., Ltd., was not considered advantageous to M. B. Co., Ltd., and on the 25th November it was agreed that that company should pay each of the two men £500 for his services for E. T. P. W., Ltd., until then and £4,000 as compensation for the loss of his right to remuneration for managing E. T. P. W., Ltd. An additional assessment to income tax under Sched. E having been made on the respondent for the year 1938-39 in respect of that £4,000, he appealed, contending that he was not assessable in respect of it as it was paid to him as compensation for the surrender of his rights to future remuneration. It was contended for the Crown that the £4,000 represented remuneration and should be taxed. The Commissioners discharged the assessment, and the Crown appealed.

LAWRENCE, J., said that the question was whether the £4,000 was paid as compensation for the loss of a capital asset or as remuneration for future services, in which case it would be taxable. The Commissioners were entitled to assume that, whether or not the respondent continued after receiving the £4,000 to perform any of the services for E.T.P.W., Ltd., which he had previously performed (a question with which it had seemed that the Commissioners had not dealt sufficiently) he was not under any obligation to do so, and that the £4,000 was therefore properly treated as compensation for the loss of his office as manager of E. T. P. W., Ltd. The documents showed that it had been thought desirable to cancel the agreement not only for the payment of a percentage of profits to the respondent, but also for the services to be rendered by him as manager of E. T. P. W., Ltd. The agreement of November, 1937, did not leave any obligation on the respondent to continue his services to E. T. P. W., Ltd., and such services could not be any part of the consideration for the £4,000. That £4,000 could not be regarded as having been paid under the agreement originally providing for the respondent's management of E. T. P. W., Ltd. The case was not on all fours with *Hunter* v. *Dewhurst* (1932), 146 L.T. 510, but was covered by the observations which Lord Atkin there made. The appeal must be dismissed.

COUNSEL : *The Attorney General* (Sir Donald Somervell, K.C.) and *R. P. Hills; F. Grant.*

SOLICITORS : *The Solicitor of Inland Revenue; Reynolds, Sons and Gorst.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Latilla *v.* **Inland Revenue Commissioners.**

Lawrence, J. 29th April, 1941.

Revenue—Income tax—Avoidance—Trading profits of company abroad—Enjoyed by person resident in United Kingdom—Whether taxable as being payable to company—Finance Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 34), *s.* 18.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Twenty-five years ago the appellant's wife acquired for a financial consideration a third share in a gold-mine in South Africa. For certain purposes of convenience the appellant's wife and the other partners transferred their interests in the mine to a company

called Latjohn Trust, Ltd., formed for the purpose of the transfer. The transferors received as consideration ordinary shares on which no dividends were ever paid and £250,000 worth of non-interest-bearing debentures. In 1935, 1936 and 1937, respectively, £24,000, £22,500 and £20,000 worth of the debentures were redeemed. In respect of sums received by his wife in pursuance of the redemption the appellant was assessed to income tax and sur-tax for the material years. He appealed against the assessments, but the Special Commissioners held that there had been a transfer of assets by virtue of which income became payable to Latjohn Trust, Ltd., persons resident or domiciled outside the United Kingdom, and that it was effected for the purpose of tax-avoidance by the appellant, who was ordinarily resident within the United Kingdom, of his liability to tax; and they confirmed the assessments. It was admitted that the appellant had through his wife power to enjoy that income within the meaning of s. 18 of the Finance Act, 1936, which provides: "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer by virtue . . . whereof income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows: (1) Where such an individual has by means of any such transfer . . . acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy . . . any income of a person resident . . . out of the United Kingdom, which if . . . received by him in the United Kingdom would be chargeable to income tax . . . that income shall . . . be deemed to be the income of that individual . . . this subsection shall not apply if the individual shows . . . that the transfer" was "effected mainly for some purpose other than . . . avoiding liability to taxation." The assessee appealed.

LAWRENCE, J., said that it was argued for the appellant that under the transfer income did not become payable to Latjohn Trust, Ltd., within the meaning of s. 18, and he relied chiefly on *Trustees of Psalms and Hymns* v. *Whitwell*, 7 T.L.R. 164, where trading profits made by the trustees were held not to be yearly interest or other annual payments within the meaning of s. 105 of the Income Tax Act, 1842, and on *R.* v. *Special Income Tax Commissioners*, 8 T.C. 367. The argument was that trade profits made by a person could not be said to be payable to him; nor trade profits made by a partnership payable to one of the partners. Had the Act of 1918, it was argued, intended to strike at trade profits, the words used would have been "income arising to persons resident or domiciled out of the United Kingdom," and the words "income becomes payable to persons . . ." were totally inapplicable. Having held that there was evidence entitling the Commissioners to conclude that the transfer was made in order to avoid taxation, his lordship said that it was one thing to say that trade profits were not yearly interest or any other annual payment within s. 105 of the Income Tax Act, 1842, and quite another when an Act, passed to prevent the evasion of taxation, referred expressly to income which by virtue of transfer of assets became payable to A but remained capable of enjoyment by B, to say that it was intended to exclude all the income from trade profits. In the Act of 1936 the word "assets" was used in the widest sense. They produced income. To whom did it become payable? Counsel contended that it became payable to no one, although it was received by Latjohn Trust, Ltd., abroad, and paid over to the appellant's wife in the United Kingdom. That argument was unacceptable. The cases in which counsel relied were distinguishable because decided on different words in a different context, and were decisions on an exemption clause in an income tax Act which exempted yearly interest and other annual payments, which words had been used in other parts of the Act in contradistinction to trade profits. The Act of 1936 dealt with quite a different topic. The application would be dismissed.

COUNSEL: *Tucker*, K.C., and *Donovan*; *The Attorney-General* (Sir Donald Somervell, K.C.) and *Stamp & Hills*.

SOLICITORS: *Birkbeck; Julius, Edwards & Co.*; *The Solicitor of Inland Revenue*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

De Buse and Others *v.* **McCarty and Others.**

Wrottesley, J. 19th May, 1941.

Defamation—Libel—Notice of meeting of borough council alleged to contain defamatory statements—Notices sent to public libraries in borough—Privilege.

Consolidated actions for libel.

The plaintiffs, employees of the defendants, Stepney Borough Council, claimed damages for alleged libel from the council and the Town Clerk of Stepney. On the 30th March, 1938, the council, acting under s. 27 of the London County Council (General Powers) Act, 1934, appointed a special committee to inquire into a certain loss of petrol which had occurred at one of the council's depots. The committee duly issued a report which fell to be considered by the council at their next meeting, to be held on the 22nd February, 1939. In accordance with s. 9 of the Metropolis Management Amendment Act, 1856, and the council's bye-laws, a notice of the meeting, signed by the town clerk in pursuance of his duty as town clerk, was on the 17th February, 1939, affixed to the door of the building, where the meeting was to be held. The notice stated, *inter alia*, that an ordinary meeting of the council would be held on the 22nd February, 1939, "for the purposes hereafter mentioned." Of the purposes specified the material one was "(xi) to consider the following report . . .," which was the report above referred to. The report which was then set out was as follows, so far as material: "Loss of petrol from the council's Gunthorpe Street Depot—Inquiry *re* (1) On the 30th March, 1938, the council appointed the undermentioned . . . special committee . . . to inquire into the . . . loss of petrol which occurred at the . . . depot during the period the 1st April to the 30th June, 1937. . . . (5) . . . the material facts relating to the shortage of petrol . . . are as follow: (*a*) The shortage of petrol amounted to 351 gallons; (*b*) the shortage was revealed as the result of a stocktaking. . . . Two employees of the council . . . J. Buttner and W. C. Pryor . . . were charged with being concerned in the stealing of petrol and were bound over by the court under the Probation of Offenders Act. . . . Buttner . . . attempted to implicate a number of his former workmates and, in fact, made allegations concerning certain of them. (7) We also determined . . . to interview in turn every employee . . . associated with the delivery, storage or . . . issue of petrol as well as those whom Buttner had attempted to implicate. . . . We have interviewed . . . those whom Buttner has attempted to implicate or concerning whom he has made implications. The following is a list of the names of employees who Buttner alleges were concerned in the stealing of petrol." The names of various employees, including the plaintiffs, with their occupations were then set out. "(14) On each of the occasions when Buttner appeared before us he . . . reiterated such allegations. On the other hand, each of the employees interviewed by us and against whom Buttner persisted in his allegations emphatically denied that the allegations . . . were true or that they had any information at all that would be of assistance to us in our efforts to elucidate this problem. . . ." The committee concluded by recommending that each of the plaintiffs should be removed from his position in the public cleansing department and transferred to other positions. In accordance with the regular practice, said to derive from implied powers conferred by s. 9 of the Act of 1856, the town clerk forwarded a copy of the notice of the meeting of the 22nd February, 1938, to each of the public libraries maintained by the council in Stepney. The copies of the notice were retained by the respective librarians and issued to members of the public only on the personal request of the reader wishing to consult them. The plaintiffs having sued the defendants for libel, they contended that it was the town clerk's duty under s. 9 of the Act of 1856 to sign the notices of the meeting and forward them to the public libraries, the notice being required by statute to be exhibited in such a place as to be accessible to any member of the public. The defendants pleaded that they published the words complained of in good faith and without malice towards the plaintiffs and in discharge of their duties. They therefore contended that the occasion of the publication of the notice was privileged. They denied the damage alleged by the plaintiffs.

WROTTESLEY, J., having referred to the practice of vestries with regard to their meetings since 1818, to s. 2 of the Parish Notices Act, 1837, and s. 9 of the Metropolis Management Amendment Act, 1856, said that Parliament had apparently throughout thought publicity desirable in matters of the kind in question. The proceedings of a metropolitan borough council being, under s. 2 (5) of the London Government Act, 1899, the same as applied to vestries in the matter of notices of meetings, it could not be said that there was a statutory duty on the defendants to publish the notice of the meeting by sending copies of it or the agenda papers to the local public libraries. The question was whether, apart from duty, the occasion of the publication was privileged: was the use of a library a reasonable way of communicating with the persons (which included the general public as well as the ratepayers of the borough) having a common interest with the defendants in the subject-matter of the communication? He held that it was reasonable. In the absence of malice the plea of privilege prevailed, and the action must be dismissed.

COUNSEL: *Gerald Gardiner; Roberts*, K.C., and *Erskine Simes*.

SOLICITORS: *Pattinson & Brewer; Hubert Crossley*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Strand *v.* **Bath and Portland Stone Firms, Ltd.**

Humphreys, Tucker and Stable, JJ. 28th May, 1941.

Rating and valuation—Premises placed in railway valuation roll as railway hereditament—Revision of roll—Premises consequently replaced in local valuation list—Amendment of list to ensure conformity with valuation roll—Amendment applicable to first quinquennial period—Liability for rates for same period—Railways (Valuation for Rating) Act, 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 12 (5).

Appeal by case stated from a decision of Wiltshire justices.

A complaint was made against the respondent company, at a court of summary jurisdiction, by the town clerk of Chippenham for their refusal to pay £55 13s. 4d. demanded from them for rates. The company occupied premises at Chippenham railway station let to them by the Great Western Railway Co. The premises were in the valuation lists of the borough of Chippenham. The £55 13s. 4d. demanded was made up of the sums respectively due for the nine years 1931-32 to 1939-40 inclusive. In the valuation

list in force on the 31st March, 1931, the premises were entered as a freight-transport hereditament occupied by the railway company. When the Railway (Valuation for Rating) Act, 1930, came into force, the premises were treated as if entered in the railway valuation roll as railway hereditaments, and were therefore excluded from the Chippenham valuation list then in force until the first railway valuation roll had been revised by the railway assessment authority under the Act. That roll having been revised in July, 1937, the premises were no longer shown in it as being or forming part of a railway hereditament.

On the 29th February, 1940, Chippenham Assessment Committee allowed a proposal, made in September, 1936, to increase the assessment of the premises to £40 a year, and also a claim by the company that the premises should be treated as an industrial hereditament. The result of those two decisions was that the valuation list then in force was amended by inclusion of the premises in them at a net annual value of £40, with rateable value £10. A similar amendment was made in the valuation list which came into force on 1st April, 1928, and expired on 31st March, 1934. The current list came into force on 1st April, 1934. The Act of 1930 amends the law relating to the valuation for rating purposes of premises occupied by railway companies and for purposes connected therewith, and it provides that as from the 1st April, 1931, the provisions of the Rating and Valuation Acts relating to the ascertainment of values of hereditaments shall cease to apply to railway hereditaments, the values of which shall be determined in accordance with the Act of 1930. Railway valuation rolls were to be prepared at intervals of five years, the first to take effect from the 1st April, 1931. It was contended for the complainant that the company were liable to rates as from the 1st April, 1931, by virtue of the proviso to s. 12 (5) of the Act of 1930, which provides: "Where . . . any premises previously treated by the authority as being a railway hereditament, or part of a railway hereditament, have ceased to be so treated, such amendments may be made of any valuation list . . . by way of proposals. . . . For the purposes of the liability of any person to rates, an amendment made under this subsection shall . . . have effect, in a case where the variation in the treatment of the premises is due to a change occurring during the quinquennial period in the occupation, or the character of the occupation, of the premises as from the date of that change, and, in any other case, as from the commencement of the quinquennial period."

It was contended for the company that the rates in question were irrecoverable by virtue of s. 12 (5), because their liability was thereby deemed to have effect as from the beginning of the quinquennial period beginning on 1st April, 1936, since the amendments of the valuation list had not taken place in the first quinquennial period (beginning on 1st April, 1931). The justices decided in favour of the company's contention, and the town clerk now appealed.

HUMPHREYS, J., said that the sole question was to what quinquennial period the words in s. 12 (5) "as from the commencement of the quinquennial period" referred. It seemed plain that the only reasonable meaning was the period made effective by the amendment to the valuation list. The expression did not refer to the period current at the date when the amendment was made. The appeal must be allowed.

TUCKER, J., agreeing, said that the necessary alteration in the valuation lists had the purpose of bringing the lists into conformity with the first valuation roll under the Act of 1930, which roll came into force on the 1st April, 1931. The quinquennial period referred to was accordingly that beginning on that date, and the company were liable for the sum claimed. He only wished to add that the fact that no objection had been taken before the justices in question to the raising of the respondents' point should not be taken as establishing a precedent authorising the taking of a point of that kind in answer to a summons for rates.

STABLE, J., agreed.

COUNSEL: *Squibb; R. M. Hughes.*

SOLICITORS: *Vizard, Oldham, Crowder & Cash*, for *Phillips and Creswick*, Chippenham, Wilts; *Titley, Long & Co.*, Bath.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Faulkner *v.* Faulkner.

Hodson, J. 4th July.

Divorce—Desertion—"At least three years immediately preceding the presentation of the petition"—Desertion alleged in answer—Answer takes place of petition—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2; *Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 176, 180.

In this husband's petition for dissolution of marriage on the ground of desertion for three years and upwards immediately preceding the presentation of the petition, the wife filed an answer alleging desertion without cause by the petitioner for three years and upwards immediately preceding the presentation of the answer. The husband's petition was dated 16th April, 1940, and the wife's answer was dated 23rd August, 1940.

HODSON, J., said that the point was taken in the registry that the word "answer" in the answer should be altered to "petition," in view of the wording of the Matrimonial Causes Act, 1937, s. 2 of which is substituted for s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides: "A petition for divorce may be presented in the High Court . . . either by the husband or the wife on the ground that the respondent . . . (*b*) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition." If the word "petition" was substituted for "answer" in this case, the wife could have no case as pleaded, because her husband's desertion would not have run for three years. A wrong view was taken in the registry, and the relevant period was the period preceding the answer, because the answer took the place of the petition in these circumstances, and was in itself a petition praying at the end of it that the marriage might be dissolved and the petitioner condemned in the costs of the proceedings and so on. This particular situation was dealt with in s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provided that where the respondent to divorce proceedings opposed the relief sought, on the ground of adultery, cruelty or desertion, the court might give the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief. An answer was in exactly the same position as a petition and, for this purpose, it was the petition prior to which the three years' desertion must run.

COUNSEL: *R. Bush James*, K.C., and *The Hon. Victor Russell; R. T. Barnard.*

SOLICITORS: *Charles Russell & Co.; Blundell, Baker & Co.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

In the Estate of J. K. Spark, deceased.

Hodson, J. 15th July.

Probate—Nuncupative will—Soldier in camp in England—Killed by bomb from enemy aeroplane—"Actual military service"—Wills Act, 1837 (*Will.* 4 *and* 1 *Vict.*, *c.* 26), *s.* 11.

Probate motion.

The deceased had been a Territorial and was mobilised on 1st September, 1939. He saw his solicitor on the same day and gave him instructions for his will, but never took the opportunity afforded him by his leaves to execute it. On 5th August, 1940, while he was in camp in England, he said to a fellow-soldier: "I wish my wife to have all I have in case I get killed." On 7th August, 1940, enemy aircraft dropped a bomb on the tent where the deceased was sleeping and he was wounded, and died on the following day. Section 11 of the Wills Act, 1837, provides that "any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act."

HODSON, J., said that there was no doubt that the words uttered on 5th August were sufficient to satisfy the necessary testamentary qualifications of a will, provided that the soldier was in a position to have the benefit of the privilege. There were phrases in some of the old cases which laid emphasis on the reason for the soldier's privilege being that a soldier *in expeditione* or in actual military service was usually *inops consilii*. But this did not really assist very much in deciding whether a soldier was in actual military service or not. In *In the Goods of Hiscock, deceased* [1901] P. 78, Sir Francis Jeune, P., said: "I quite agree that it is not right to consider, in individual cases, whether the person whose will is in question is *inops* or not, because there might be cases where a man could not be said to have been *inops* but who would yet come within the words of the Act"; and he went on to give an illustration of a case of that kind. In *In re Stable, deceased, Dalrymple* v. *Campbell* [1919], P. 7, although it did not appear that the deceased was ever under orders to proceed overseas at the time of his death, he was not in any sense *inops consilii*, but Horridge, J., had no difficulty in holding that he was in actual military service within the meaning of the section.

It was quite clear that in this war the extent of military operations had been very much enlarged, in depth and in height, and a soldier in camp, even though in this country and not under orders to proceed overseas, was in actual military service. The will of 5th August, 1940, was entitled to be admitted to probate as having been made by the deceased while in actual military service.

COUNSEL: *G. C. Tyndale* and *C. O. Herd.*

SOLICITORS: *Brooks, Davidson* and *Batley.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

PROBATE PRACTICE NOTE.

A practice note has been issued in the Probate Registry to the effect that where the Custodian of Enemy Property requests the Public Trustee to apply for a grant of administration of an estate possessing an enemy interest his consent need not be given in writing, provided that it is sworn in the oath to lead the grant that the Public Trustee makes the grant with the consent of the Custodian. In cases on motion the consent is sworn to in the evidence in support.

The Lord Chancellor has appointed Mr. Alan Chancellor Nesbitt to be one of the Conveyancing Counsel of the Supreme Court to fill the vacancy caused by the resignation of Mr. Arthur Eustace Russell. Mr. Nesbitt was called by Lincoln's Inn in 1899.